



Comptroller General  
of the United States

Washington, D.C. 20548

1460-10

## Decision

**Matter of:** Niles Janitor Service & Supply, Inc.

**File:** B-246575.3

**Date:** March 3, 1992

Brian J. Hundertmark, Esq., and Barry Roberts, Esq., for the protester.

Harry Gerdy, Esq., General Services Administration, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Agency properly rejected protester's bid as nonresponsive where bid guarantee, in the form of an irrevocable letter of credit, was unacceptable because it incorporated provision of Uniform Customs and Practice for Documentary Credits which renders the liability of the issuing bank uncertain in the event of certain interruptions in the bank's business.

### DECISION

Niles Janitor Service & Supply, Inc. protests the rejection of its apparent low bid as nonresponsive for failure to provide an adequate bid guarantee, as required by invitation for bids (IFB) No. GS-05P-91-GAC-0167, issued by the General Services Administration (GSA) for janitorial and related services at the Minton-Capehart Federal Building in Indianapolis, Indiana. Niles contends that the bank letter of credit submitted with its bid was an acceptable bid guarantee and that the firm therefore should have been awarded the contract.

We deny the protest.

The IFB required each bidder to submit with its bid a bid guarantee in the form of a firm commitment, such as a bid bond, irrevocable letter of credit, or other security specified by the incorporated clause from Federal Acquisition Regulation § 52.228-1, "Bid Guarantee," in an amount equal to 20 percent of the annual bid price for the initial 12-month period of the contract.

Niles submitted with its bid an "Irrevocable Letter of Credit," issued by a bank, which provided that it was

"subject to the Uniform Customs and Practice for Documentary Credits (UCP) 1983 revision. The International Chamber of Commerce Publication No. 400." GSA found the letter deficient on the ground that the reference to the UCP rendered its enforceability uncertain by restricting the government's right to draw upon the letter.

In its protest, Niles explains that the letter of credit it submitted was on the bank's standard form and had previously been accepted by GSA in other procurements. Niles contends that incorporation of the UCP in no way reduced the protection afforded the government by the letter. As evidence of this, Niles points out that the form of irrevocable letter of credit recommended in the Federal Property Management Regulations (FPMR), 41 C.F.R. § 101-45.4805 (1991), and, most recently, in the Office of Management and Budget, Office of Federal Procurement Policy's (OFPP) "Policy Letter on Use of Letters of Credit," 56 Fed. Reg. 58,932 (1991), provides that the letter shall be subject to the UCP.

A properly drawn irrevocable letter of credit is a firm commitment to assure the government that a successful bidder will execute contractual documents and provide payment and performance bonds as required under the contract. Its purpose is to secure the bank's liability to the government for excess procurement costs in the event the bidder fails to honor its bid in these regards. The key question in determining the sufficiency of a bid guarantee (irrevocable letter of credit in this instance) is whether the government will be able to enforce it. Imperial Maintenance, Inc., B-224257, Jan. 8, 1987, 87-1 CPD ¶ 34. When the liability of the bank is not clear, the guarantee properly may be regarded as defective and the bid rejected as nonresponsive. BKS Constr. Co., 66 Comp. Gen. 492 (1987), 87-1 CPD ¶ 558.

We have previously recognized that the enforceability of the bank's obligation under the letter of credit may be rendered uncertain where, by its terms, the letter is subject to terms contained in a document or other undisclosed terms not contained in the letter itself. See Carolina Sec. Patrol, Inc., B-236276, Oct. 5, 1989, 89-2 CPD ¶ 320. For example, in BKS Constr. Co., supra, we held that a letter of credit which by its terms was subject to the UCP was defective where the letter did not state that it was irrevocable; under the UCP, unless the letter states that it is irrevocable, it shall be deemed revocable. See UCP § 7.

The current recognized commercial banking norm governing letters of credit is the UCP. It is evident, from their reliance on the UCP to govern enforcement of the letters, that both OFPP and the drafters of the FPMR have concluded that the terms of the UCP generally are not inconsistent

with safeguarding the government's right to enforce the bank's liability under the irrevocable letter of credit for excess reprocurment costs in the event the bidder fails to honor its bid. Indeed, OFPP has concluded that the UCP is in some respects more favorable to the beneficiary (government) than the Uniform Commercial Code, see 56 Fed. Reg. 58,933, which we have previously recognized as constituting basic law in this area. See Juanita H. Burns and George M. Sobley (a joint venture), 55 Comp. Gen. 587 (1975), 75-2 CPD ¶ 400. In view of OFPP's current policy and the widespread acceptance of the UCP as constituting basic law governing enforcement of irrevocable letters of credit, it is our view that incorporating the UCP in a letter of credit does not necessarily render enforcement of the letter uncertain.<sup>1</sup>

Where a specific provision is identified that clearly reduces the government's rights under a letter of credit, it remains our view that the provision renders the letter an unacceptable bid guarantee. We find that Article 19 of the UCP constitutes such an impermissible qualification. Article 19 reads as follows:

"Banks assume no liability or responsibility for consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control, or by any strikes or lockouts. Unless specifically authorized, banks will not, upon resumption of their business, incur a deferred payment undertaking, or effect payment, acceptance or negotiation under credits which expired during such interruption of their business."

As noted by GSA, OFPP takes exception to Article 19 of the UCP. OFPP's recommended letter of credit instead provides that "if this Credit expires during an interruption of business as described in Article 19 . . . the bank hereby specifically agrees to effect payment if this Credit is drawn against within 30 days after the resumption of business." 56 Fed. Reg. 58,935. As indicated by its rejection of the provision, OFPP has concluded that Article 19 fails to adequately protect the government's interest in securing payment under a letter of credit in the event that the letter expires during an interruption of

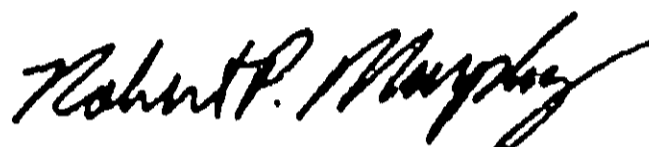
---

<sup>1</sup>We express no view, however, as to whether an agency may reasonably promulgate regulations establishing a mandatory, uniform irrevocable letter of credit affording the government greater protection than does the language of the UCP.

business of the issuing bank. We find OFPP's concern in this regard to be reasonable; we see no reason why the government must relinquish its right to enforce payment under the letter due to expiration of the letter during a period when an interruption in the bank's business precludes drawing against the letter.

Since the letter of credit submitted by Niles was subject without reservation to the UCP, thereby subjecting the government to the risk that its right to enforce the letter could be rendered uncertain under some circumstances by Article 19 of the UCP, we conclude that GSA properly found the letter to be defective and Niles' bid therefore to be nonresponsive. Although the agency may have previously accepted as bid guarantees identical letters of credit, an agency's past practice is not a basis for questioning its application of otherwise correct procurement practices. General Elec. Co., B-228191, Dec. 14, 1987, 87-2 CPD ¶ 585.

The protest is denied.

  
for James F. Hinchman  
General Counsel